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IN THE

SUPREME COURT of the UNITED STATES

October Term, 1962

No. 1008

W. R. ARTHUR & CO., INC.,

Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION,

Appellee.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF WISCONSIN

JURISDICTIONAL STATEMENT

ADOLPH J. BIEBERSTEIN
Attorney for Appellant
121 West Doty Street
Madison 3, Wisconsin

Of Counsel:

JOHN C. WICKHEM
1 So. Main Street
Janesville, Wisconsin

GEORGE L. WEISBARD
11 So. La Salle Street
Chicago, Illinois

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W. R. ARTHUR & CO., INC.,

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WISCONSIN DEPARTMENT OF TAXATION,

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APPEAL FROM THE SUPREME COURT
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JURISDICTIONAL STATEMENT

I. DECISION APPEALED FROM

This is an appeal from a Judgment or Mandate of the Supreme Court of the State of Wisconsin. The opinion delivered in that Court is reported as *W. R. Arthur & Co., Inc. v. Wisconsin Department of Taxation,* (November 27, 1962) 18 Wis. 2d 225, 118 N. W. 2d 168. A copy of the opinion is appended to this statement as a part of the Appendix pp. 1a-8a. A copy of the Judgment or Mandate is appended to this statement as a part of the Appendix pp. 8a-9a.

II. THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

A. *The Nature of the Proceeding*

This is an action commenced by the appellant taxpayer in the Circuit Court of Dane County, Wisconsin, to review a March 16, 1961 decision of the Wisconsin Board of Tax Appeals affirming an assessment upon taxpayer of $34,490.09 additional Wisconsin income taxes for 1953 through 1956 inclusive.

The Dane County Circuit Court concluded that the Department's apportionment arbitrarily assigned income to Wisconsin, at least to the extent of 33 1/3% because, disregarding the facts in the record before it, the Department improperly assigned 100% of the taxpayer's gross revenues to Wisconsin.

Appellee Wisconsin Department of Taxation thereupon appealed to the Supreme Court of the State of Wisconsin which reversed the Circuit Court by Judgment or Mandate entered November 27, 1962 and directed reinstatement of the decision of the Wisconsin Board of Tax Appeals. Motion for rehearing was denied February 5, 1963.

This appeal is taken pursuant to 28 U. S. C. A. Section 1257(2).

B. *Dates of Judgment Appealed From and Notice of Appeal.*

The Judgment or Mandate of the Supreme Court here appealed from, was dated and entered November 27, 1962.

Appellant's motion for rehearing was denied February 5, 1963 by The Wisconsin Supreme Court.

The Notice of Appeal to the Supreme Court of The United States was filed in the Supreme Court of the State of Wisconsin on February 13, 1963.

C. *Statute Conferring Jurisdiction*

The appellate jurisdiction of the United States Supreme Court rests upon 28 U. S. C. A. Section 1257(2), providing for appeals from the highest court of a state

> "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity."

D. *Cases Sustaining Jurisdiction*

The Wisconsin Board of Tax Appeals is created by Section 73.01 Wisconsin Statutes as the sole reviewing agency of determinations by the Wisconsin Department of Taxation, which in turn are reviewable by the Wisconsin Court (Section 73.015 Wisconsin Statutes).

An order of the Wisconsin Board of Tax Appeals, exercising its legislative authority, constitutes a statute under the provisions of said Section 1257(2), of 28 U. S. C. A.

Live Oak Water User's Ass'n v. Railroad Commission, 269 U. S. 354, 356, 70 L. ed. 305, 308, 46 S. Ct. 149;

Lake Erie & Western R. Co. v. Public Utilities Comimssion, 249 U. S. 422, 424, 63 L. ed. 684, 687, 39 S. Ct. 345;

Suetan R. & T. Co. v. Department of Labor, 277 U. S. 13 136, 72 L. ed. 819, 821, 48 S. Ct. 505;

Hamilton v. Regents, 293 U. S. 245, 258, 79 L. ed. 343, 350;

Atchison R. Co. v. Public Utilities Commission, 346 U. S. 346, 348-9, 98 L. ed. 51, 58.

E. *Statute Involved*

The Statute involved is Section 71.07 Wisconsin Statutes; its pertinent language has not been amended since 1951. Said statute is hereinafter set forth. Subsection (2) thereof prescribes a three factor formula for taxation of persons engaged in a unitary business within and without Wisconsin. Concededly two of the factors, namely (cost of manufacturing and sales) are inappropriate to the appellant taxpayer. Subsection (5) provides for the establishment of a departmental rule where the statutory formula is inappropriate. This rule is hereinafter set forth.

"Section 71.07

"(1) * * *

"(2) Persons engaged in business within and without the state shall be taxed only on such income as is derived from business transacted and property located within the state. The amount of such income attribut-

able to Wisconsin may be determined by an allocation and separate accounting thereof, when the business of such person within the state is not an integral part of a unitary business, * * *. In all cases in which allocation and separate accounting is not permissible, the determination shall be made in the following manner: (There follows a provision for the deduction of nonapportionable income). The remaining net income shall be apportioned to Wisconsin on the basis of the ratio obtained by taking the arithmetical average of the following 3 ratios:

"(a). The ratio of the tangible property, real, personal and mixed, owned and used by the taxpayer in Wisconsin in connection with his trade or business during the income year to the total of such property of the taxpayer owned and used by him in connection with his trade or business everywhere.

"(b) In the case of persons engaged in manufacturing or in any form of collecting, assembling or processing goods and materials, the ratio of the total cost of manufacturing, collecting, assembling or processing within this state to the total cost of manufacturing, or assembling or processing everywhere. * * *

"(c) In the case of trading, mercantile or manufacturing concerns the ratio of the total sales made through or by offices, agencies or branches located in Wisconsin during the income year to the total net sales made everywhere during said income year.

"(3) Where, in the case of any person engaged in business within and without the state of Wisconsin and required to apportion his income as herein provided, it shall be shown to the satisfaction of the department of taxation, that the use of any one of the 3 ratios above provided for gives an unreasonable or inequitable final average ratio because of the fact that

such person does not employ, to any appreciable extent in his trade or business in producing the income taxed, the factors made use of in obtaining such ratio, this ratio may, with the approval of the department of taxation, be omitted in obtaining the final average ratio which is to be applied to the remaining net income.

"(4) * * *

"(5) If the income of any such person properly assignable to the state of Wisconsin cannot be ascertained with reasonable certainty by either of the foregoing methods, then the same shall be apportioned and allocated under such rules and regulations as the department of taxation may prescribe.

"(6) * * *"

RULE INVOLVED

"TAX 2.45 APPORTIONMENT IN SPECIAL CASES. When the business of any person within Wisconsin is an integral part of a unitary business conducted within and without Wisconsin, but because of unusual or unique circumstances the portion of the income of such person derived from business transacted in Wisconsin cannot be ascertained with reasonable certainty by use of the apportionment formula provided in section 71.07(2) of the statutes (or by separate accounting in view of the unitary nature of the business); the department will substitute in the place of some or all of the statutory apportionment factors such other factor or factors as will reasonably apportion to Wisconsin the business income properly assignable to Wisconsin. In any case in which an apportionment of business income is made pursuant to this regulation, the taxpayer, at the time of the asessment, will be apprised of the factors used in the formula adopted.

The business income of interstate air carriers shall be apportioned as provided in section Tax 2.46."

The above statute appears in Volume 1, Wisconsin Statutes 1961, pages 1476 and 1477.

The above Rule appears in Volume 6, Wisconsin Administrative Code, Rules of Department of Taxation, Section 2.45, page 14a.

III. THE QUESTION PRESENTED BY THE APPEAL

Has the appellant taxpayer been denied its right to due process under Article XIV of The Amendments to the Constitution of the United States, where, to determine taxpayer's Wisconsin taxable income, the Wisconsin Department of Taxation has applied a three factor apportionment formula, and has used one factor that assigns all of taxpayer's gross revenues to Wisconsin, despite a clear factual record that a substantial part of such revenues are earned by services performed and business transacted in other states.

IV. STATEMENT OF THE CASE

A. *Material Facts*

The undisputed facts show appellant taxpayer is a unitary business, incorporated in Illinois and engaged in interstate commerce pursuant to an I. C .C. contract motor carrier permit issued under Section 209 of Part II of the Interstate Commerce Act. Pursuant thereto, taxpayer transports for General Motors Corporation only, new Chev-

rolet automobiles and trucks from taxpayer's principal office in Janesville, Wisconsin, to points in Wisconsin, Illinois, Indiana, Missouri, Iowa, Minnesota, North Dakota, South Dakota, Nebraska and Montana. Authority to transport to Nebraska, South Dakota, North Dakota and Montana was acquired on May 21, 1956. The remaining destination states were served throughout all the tax periods in question (1953-1956). About 2% of its traffic did not originate in Janesville, Wisconsin, but was comprised of Illinois intrastate traffic, interstate traffic between points in states other than Wisconsin and interstate traffic from outside Wisconsin to Wisconsin points.

The appellant taxpayer filed its returns upon the basis of a single apportionment factor, its proportion of revenue miles in Wisconsin compared to its revenue miles everywhere. (*Central Greyhound Lines, Inc. v. Mealey* (1948), 334 U. S. 653, 92 L. ed. 1633, 68 S. Ct. 1260). This resulted in the following in Wisconsin proportion.

1953	1954	1955	1956
55.776%	49.977%	51.214%	50.858%

The Wisconsin Department of Taxation in assessing a deficiency, prescribed a three factor formula consisting of (a) assignment of 100% of the appellant's gross revenues to Wisconsin, (b) the proportion of appellant's revenue miles in Wisconsin compared to its revenue miles everywhere, and (c) the appellant's payroll in Wisconsin compared to its total payroll everywhere.

The undisputed facts show that the appellant's gross revenues were compensation for its four service activities, to-wit:

(1) A rate for each mile that each automobile or truck was transported. As stated above, Wisconsin revenue miles varied from 49.977% in 1954 to 55.776% in 1953.

(2) A surcharge for the loading and unloading activity involved in each automobile or truck handled. Ninety per cent of the unloadings occurred outside Wisconsin.

(3) A surcharge for each 150 mile block of transportation of each automobile or truck, after the first 150 miles. This surcharge was applied largely to movements outside Wisconsin.

(4) A surcharge where a portion of the automobiles or trucks was delivered to one consignee and the balance to one or more others. This activity occurred at least 90% outside Wisconsin.

The appellant taxpayer filed a timely petition for review of the action of the Wisconsin Department of Taxation to the Wisconsin Board of Tax Appeals, pursuant to Section 73.01(6) Wisconsin Statutes, the sole remedy provided by Wisconsin Statutes. Inter alia said petition stated:

> "That the tax so assessed to petitioner and computed by said formula by the respondent, subjects to taxation in Wisconsin income derived by petitioner from property located outside and business transacted outside the state of Wisconsin, in violation of Sections 71.01 and 71.07 Wisconsin Statutes and in violation of Article XIV of the Amendments to the United States Constitution." (R. 207)

The taxpayer appellant thereafter filed a timely petition for review of the Decision of said Wisconsin Board of Tax Appeals, with the Circuit Court for Dane County,

Wisconsin, under the sole remedy provided by the Wisconsin Statutes, Section 73.015 and Chapter 227. In such petition appellant taxpayer again asserted, inter alia, that the action of the Wisconsin Board of Tax Appeals "unlawfully imposes income taxes by the State of Wisconsin upon income derived from business transacted and property located outside the State of Wisconsin" and "is contrary to the constitutional rights and privileges of petitioner." (R. 125, 126)

From the decision of the Circuit Court of Dane County, Wisconsin, favorable to appellant taxpayer, Wisconsin Department of Taxation appealed to the Wisconsin Supreme Court, which rendered the judgment or mandate from which this appeal is taken. Appellant taxpayer timely moved the Wisconsin Supreme Court for rehearing, upon the basis inter alia that said judgment or mandate resulted in imposing an extra-territorial tax by the State of Wisconsin, contrary to Article XIV of the Amendments to the United States Constitution.

The Wisconsin Supreme Court denied the appellant's motion for rehearing, without opinion on February 5, 1963.

V. THE QUESTION IS SUBSTANTIAL

The issue involved in this appeal, is similar to that in *Central Greyhound Lines v. Mealey,* 334 U. S. 653, 92 L. ed. 1633, 68 S. Ct. 1260. There the Court held that the State of New York may not impose a gross receipts tax, unapportioned, upon interstate transportation where the facts disclosed such transportation activities to be over

routes also utilizing the highways of Pennsylvania and New Jersey.

In the instant case, the State of Wisconsin has employed the prohibited method of taxation as one of three factors of equal weight in assessing income taxes upon appellant.

Because of the addition of the factor assigning 100% of the taxpayer's gross revenues to Wisconsin, irrespective of the sources from which they were produced, the resulting Wisconsin proportion is as follows:

1953	1954	1955	1956
75.074%	71.512%	71.814%	71.801%

This case is similar to that of *Hans Rees' Sons v. North Carolina ex rel. Maxwell*, 283 U. S. 123, 75 L. ed. 879, 51 S. Court 385. There the taxpayer was organized under the laws of New York but had a manufacturing plant in North Carolina. The income from its business was derived from three sources—buying profit, manufacturing profit and selling profit. The evidence showed that the average income having its source in the manufacturing and tanning operations in North Carolina was 17 to 21.7% whereas North Carolina taxed approximately 80%. This Court concluded that the statutory method of the State of North Carolina operated unreasonably and arbitrarily in attributing to North Carolina a percentage of income out of all appropriate proportion to the business transacted by the taxpayer in that state, and that the taxes were therefore imposed beyond the state's authority.

This Court has consistently held that where a state levies income taxes upon a taxpayer, which is a unitary business conducting its business activities in more than one state, the tax can only be sustained if it is not discriminatory and is properly apportioned to the activities within the taxing state.

This principle was stated by this Court as late as *Northwestern States Portland Cement Co. v. Minnesota* (1959), 358 U. S. 450, 3 L. ed. 2d 421, 79 S. Ct. 357, 67 A. L. R. 2d 1292.

Here the Wisconsin Court construed the Wisconsin Statute as authorizing a three factor formula including a factor attributing 100% of the taxpayer's gross revenues to Wisconsin.

Wisconsin has attempted to avoid the invalidity of the use of a formula composed of assignment of 100% of gross revenue to Wisconsin, by utilizing it to the extent of one-third. This reduces its impact, but since the use of such a factor alone violates the taxpayer's constitutional rights, it is none the less offensive when used to the extent of one-third, or in any other substantial proportion.

This issue is of heavy consequence to every industry conducting a unitary business in more than one state. It is of particular importance to all transportation businesses operating in more than one state. It is an issue that can be resolved only by decision of the United States Supreme Court.

It is respectfully requested that the Supreme Court o the United States take jurisdiction over this appeal.

Respectfully submitted,

ADOLPH J. BIEBERSTEIN
Counsel for Appellant
121 West Doty Street
Madison 3, Wisconsin

Of Counsel:

JOHN C. WICKHEM
1 So. Main Street
Janesville, Wisconsin

GEORGE L. WEISBARD
11 So. La Salle Street
Chicago, Illinois

Taxpayer's gross revenues are derived from four sources: (1) A flat rate per mile per unit transported; (2) a loading and unloading fee for each vehicle handled; (3) an additional fee per cargo unit for each 150 miles after the first 150 miles; and (4) an additional surcharge for loads termed "splits," that is, where part of a load is delivered to one dealer, with the balance of the load delivered to another dealer.

The decision and order of the board of tax appeals affirmed an assessment of additional Wisconsin income taxes for the years 1953 through 1956 against the respondent taxpayer. The additional assessment resulted from an apportionment of the taxpayer's net business income in which a three-factor formula was used. The formula consisted of revenue miles, payroll and originating revenue.

The taxpayer appealed the decision of the board of tax appeals to the circuit court for Dane county on the grounds that the originating revenue factor used in the above formula measured and taxed services performed by the taxpayer outside of Wisconsin in violation of sec. 71.07 (2), Stats. The circuit court agreed with this contention and reversed the board's decision. In reversing the board, the circuit court deleted the originating revenue factor from the formula used by the board and inserted in its place a tangible property factor. The final formula prescribed by said court was made up of a revenue mile factor, a payroll factor and a property factor. It is from the use of this formula that the department of taxation appeals.

Sec. 71.07, Stats., provides, so far as here material:

"(1) * * *

"(2) Persons engaged in business within and without the state shall be taxed only on such income as is derived from business transacted and property located within the state. The amount of such income attributable to Wisconsin may be determined by an allocation and separate accounting thereof, when the business of such person within the state is not an integral part of a unitary business, * * * In all cases in which allocation and separate accounting is not permissible, the determination shall be made in the following manner: [There follows a provision for the deduction of non-apportionable income.] The remaining net income shall be apportioned to Wisconsin on the basis of the ratio obtained by taking the arithmetical average of the following 3 ratios:

"(a) The ratio of the tangible property, real, personal and mixed, owned and used by the taxpayer in Wisconsin in connection with his trade or business during the income year to the total of such property of the taxpayer owned and used by him in connection with trade or business everywhere . . .

"(b) In the case of persons engaged in manufacturing or in any form of collecting, assembling or processing goods and materials, the ratio of the total cost of manufacturing, collecting, assembling or processing within this state to the total cost of manufacturing, or assembling or processing everywhere. . . .

"(c) In the case of trading, merchantile or manufacturing concerns the ratio of the total sales made through or by offices, agencies or branches located in

Wisconsin during the income year to the total net sales made everywhere during said income year.

"(3) Where, in the case of any person engaged in business within and without the state of Wisconsin and required to apportion his income as herein provided, it shall be shown to the satisfaction of the department of taxation, that the use of any one of the 3 ratios above provided for gives an unreasonable or inequitable final average ratio because of the fact that such person does not employ, to any appreciable extent in his trade or business in producing the income taxed, the factors made use of in obtaining such ratio, this ratio may, with the approval of the department of taxation, be omitted in obtaining the final average ratio which is to be applied to the remaining net income.

"(4) . . .

"(5) If the income of any such person properly assignable to the state of Wisconsin cannot be ascertained with reasonable certainty by either of the foregoing methods, then the same shall be apportioned and allocated under such rules and regulations as the department of taxation may prescribe.

"(6) . . ."

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216 *Rule Involved*

"Tax 2.45 Apportionment in Special Cases. (Section 71.07 (5), Wis. Stats.) When the business of any person within Wisconsin is an integral part of a unitary business conducted within and without Wisconsin, but because of unusual or unique circumstances the portion of the income of such person derived from business transacted in Wisconsin cannot be ascertained with reasonable certainty by use of the apportionment

formula provided in section 71.07 (2) of the statutes (or by separate accounting in view of the unitary nature of the business), the department will substitute in the place of some or all of the statutory apportionment factors such other factor or factors as will reasonably apportion to Wisconsin the business income properly assignable to Wisconsin. In any case in which an apportionment of business income is made pursuant to this regulation, the taxpayer, at the time of the assessment, will be apprised of the factors used in the formula adopted. The business income of interstate air carriers shall be apportioned as provided in section Tax 2.46."

217 GORDON, J. The legislature recognized that there would be difficulties in apportioning the taxes of a unitary business which operates partly in Wisconsin and partly outside this state. A "unitary" business is one which functions as a single unit; that is, it is not divided into a separate entity for each of the states in which it operates. The legislature also recognized that no fixed formula would fairly fit all the multitudinous types of business. Accordingly, it gave a broad mandate to the department of taxation in sec. 71.07 (5), Stats., to prescribe rules to fit those cases which do not fall within the other provisions of sec. 71.07.

W. R. Arthur & Co., Inc., is a unitary company engaged in a multi-state trucking business. It is clear that the statutory formula contained in sec. 71.07 (2) is inappropriate for purposes of apportioning the income of this taxpayer; the statutory formula is designed for manufacturing and mercantile enterprises.

As reflected in sec. 2.45 of the Wisconsin Administrative Code, the department of taxation has adopted a rule to govern those cases which do not fall within the statutory formula. In such special cases the department "will substitute in the place of some or all of the statutory apportionment factors such other factor or factors as will reasonably apportion to Wisconsin the business income properly assignable to Wisconsin." The problem before us is whether the factors and the formula used in the instant case fairly accomplish that purpose.

The taxpayer's principal argument is that the "originating revenue" factor is arbitrary and improper. In this case the originating revenue factor equals the gross receipts. The two other factors which are employed in the formula adopted by the board of tax appeals (revenue 218 miles and payroll) are not challenged by the taxpayer.

In using 100 per cent of the taxpayer's gross revenue in its formula, has the appellant improperly weighted its formula so that it seeks to tax income derived from business transacted outside of Wisconsin?

We reach the conclusion that the originating revenue or gross receipts factor is not an arbitrary one, nor does it taint the ultimate formula adopted by the board of tax appeals. As applied to this particular taxpayer, the inclusion of 100 per cent of gross receipts as one factor in a three-factor formula constitutes a reasonable means of reflecting the company's income attributable to business done in Wisconsin. The formula takes into consideration the peculiar nature of its business activity; it also takes into consideration the fact that the respondent's one and only

customer is in Wisconsin and that the taxpayer is headquartered in this state.

If used as a single factor, gross receipts would result in all of the taxpayer's income being taxed here, and this would obviously constitute an unfair tax. However, when it is used in conjunction with the two other factors, it cannot be said to be arbitrary or to result in an unfair apportionment of the income of the respondent under sec. 71.07 (5), Stats. The case of *Department of Taxation v. Blatz Brewing Co.* (1961), 12 Wis. (2d) 615, 108 N. W. (2d) 319, did not purport to interpret sec. 71.07(5), and is therefore not controlling.

If one of several factors is challenged, it must be evaluated by the court not only upon its own merits but also in relation to the other factors, as well as in relation to the total composite result. Thus, the court must look not only at the individual factors but also at the final formula. We believe that in context with each of the other factors included in the formula adopted by the board of tax appeals in the instant case, the factors are all reasonable.

219 When a multi-factor formula is used, each factor must bear a reasonable relationship to the taxpayer's business and to the other factors of the formula; it must also produce a fair apportionment when set in combination with other germane factors. The test is not whether, standing alone, a given factor produces a fair apportionment.

In our opinion, the taxpayer did not meet its burden of proving that the formula adopted by the board of tax appeals unfairly apportioned its income in Wisconsin. This

court has placed the burden of proof upon the taxpayer in such cases as *Department of Taxation v. O. H. Kindt Mfg. Co.* (1961), 13 Wis. (2d) 258, 268, 108 N. W. (2d) 535, and *Laabs v. Tax Comm.* (1935), 218 Wis. 414, 424, 261 N. W. 404. However, we have not heretofore resolved the question of the burden of proof regarding an allegedly arbitrary formula as applied to an interstate taxpayer. We share the view expressed by the United States Supreme Court in *Butler Bros. v. McColgan* (1942), 315 U. S. 501, 507, 62 S. Ct. 701, 86 L. ed. 991:

> "One who attacks a formula of apportionment carries a distinct burden of showing by 'clear and cogent evidence' that it results in extraterritorial values being taxed."

By the Court—Judgment reversed with directions to enter judgment affirming the order of the Wisconsin board of tax appeals.

212 JUDGMENT OR MANDATE OF SUPREME COURT OF WISCONSIN ENTERED NOVEMBER 27, 1962

(Formal parts omitted)

This cause came on to be heard on appeal from the judgment of the Circuit Court of Dane County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Dane County, in this cause, be, and the same is hereby, reversed.

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to enter

judgment affirming the order of the Wisconsin Board of Tax Appeals.

101-122 OPINION OF THE CIRCUIT COURT
OF DANE COUNTY, WISCONSIN
FILED NOVEMBER 22, 1961
(Formal parts omitted)

101 NATURE OF ACTION

This is an action under Chapter 227 to review a decision and order of the Wisconsin Board of Tax Appeals (hereinafter referred to as the Board) affirming an additional income tax assessment made by the respondent Wisconsin Department of Taxation (hereinafter referred to as the Department) upon the petitioner W. R. Arthur & Company, Inc., (hereinafter referred to as the taxpayer) for the calendar years 1953 to 1956, inclusive.

FACTS

The taxpayer, an Illinois corporation with its corporate offices and main terminal in Janesville, Wisconsin, is a contract carrier. Taxpayer serves only one customer, General Motors Corporation, and its principal and practically sole function is to deliver Chevrolet cars and trucks manufactured at the Janesville, Wisconsin, plant to Chevrolet dealers located in some 11 states, including Wis-
102 consin. The other states include Illinois, Indiana, Iowa, Minnesota, Missouri and the upper peninsula of Michigan. On March 27, 1956, taxpayer was authorized to make

deliveries in the states of Montana, North Dakota and Nebraska.

In conveying the vehicles in question taxpayer for the most part uses the haulaway or truckaway method. Under this method four passenger cars or three trucks are loaded on a semi trailer at Janesville and driven by taxpayer's drivers to their respective points of destination. Where the destinations were in certain areas of Iowa, Nebraska, Minnesota, North Dakota or Montana, the load would pass through intermediate terminals of the taxpayer. These might be one or more. At such terminals the tractor or power unit of the taxpayer is unhitched from the loaded trailer and another power unit substituted, with a new driver. The cargo units are also re-inspected at such terminals and the tractor or power unit is serviced before being dispatched. Most of taxpayer's deliveries were multiple rather than single. However, where single deliveries were made it was the practice to make them in relatively the same general area so that, for example, a trailer would not have to travel a long distance with only one car or truck as its load.

About 4 per cent of the vehicles were transported un-
103 der their own power by employees of the taxpayer. This is called the drive-away method. Approximately 98 per cent of the hauls originated in Janesville while about 90 per cent of the deliveries were made outside of the State of Wisconsin.

As indicated, taxpayer maintains its main terminal at Janesville with another Wisconsin terminal located at Black River Falls. A permanent terminal was established at Manchester, Iowa, in 1954 but prior thereto and as early

as 1953 a temporary terminal was utilized at Cedar Rapids, Iowa. A Minnesota terminal on an experimental basis existed in Minnesota during the latter part of 1956 which finally culminated in a permanent terminal being established in Anoka, Minnesota, in that year.

The Manchester, Iowa, terminal had about 30 tractors with drivers, shop personnel of four or five persons, several supervisory employees and an office clerk. There were also other facilities for parking and servicing the tractors and trailers at the Iowa terminal.

Approximately 5 to 15 tractor units were stationed at the Minnesota location. In all the taxpayer owned and operated approximately 300 tractors and 225 semi trailers during the years in question. Of the tractors about 200 104 were stationed at Janesville, 60 at Black River Falls, and the rest at the Iowa and Minnesota terminals as indicated. At the Black River Falls, Iowa and Minnesota terminals the tractor or power units would be exchanged for a different tractor and a new driver would continue with the load after the vehicle had been serviced at the respective terminals.

It should be pointed out that the taxpayer is strictly a one-way carrier. At least 98 per cent of its revenue is obtained from the movement of freight in one direction. The return is empty and produces no revenue.

Taxpayer's gross revenues are derived from four sources. (1) a flat rate per mile per unit transported, i.e., originally this was 9 cents per mile for each passenger car and 12 cents per mile for each truck. A semi trailer holds four passenger cars or three trucks. During the latter part

of the years in question this rate per mile was upped but the ratio as between cars and trucks was kept the same. (2) Taxpayer received a loading and unloading fee for each vehicle handled. This amounted to $3 per passenger car unit and it was increased by one-third or to $4 in the case of a truck unit for loading, unloading and delivery service. (3) Taxpayer also received an additional 75 cents per cargo unit for each 150 miles after the first 150 miles,
105 which was to partially compensate for the driver's lodging. This 75 cent surcharge was also increased by one-third or to $1 in the case of trucks. (4) Taxpayer also received an additional surcharge of $1.50 per cargo unit for "splits." Such a surcharge, of course, would not apply if all four automobile units were delivered to one consignee at a single destination. However, should each of such four vehicles be delivered to four different consignees than a surcharge of $6 would be imposed. This was considered a delivery charge.

The foregoing rates were increased in various respects between June of 1955 and October of 1956 but the amounts of such increases are not material to this dispute.

The taxpayer initially filed Wisconsin income tax returns for each of the four years in question as a unitary business, and in those returns the taxpayer apportioned its net income between Wisconsin and the other states based only on the percentage of revenue miles traveled in Wisconsin. This was slightly in excess of 50 per cent.

The Department made an additional assessment of income taxes against the taxpayer using a two factor formula, i.e., revenue miles and payroll. Payroll was based on where the particular employee was headquartered and not where

he actually earned his salary or wages. The taxpayer duly filed its application for abatement and the Depart-
106 ment revised its formula for determining the percentage of taxpayer's income attributable to Wisconsin and invoked a ratio which took into account the arithmetical average of the following three separate factors: (1) Revenue miles traveled in Wisconsin. (2) Payroll. (The payroll factor was determined by allocating to Wisconsin all executive, supervisory and other non-driver personnel headquartered in Wisconsin and by dividing driver personnel between Wisconsin and other states based on the revenue miles traveled by such driver personnel within and without the State of Wisconsin.) (3) Originating revenues. This factor was deemed to be 100 per cent Wisconsin because all of the taxpayer's revenue was received at Janesville even though the contracts with General Motors were negotiated and executed in Detroit.

Based on the foregoing three factors the computation of the final ratio for each year involved was as follows:

	1953	1954	1955	1956
Payroll	69.445%	64.560%	64.225%	64.545%
Revenue Miles	55.776%	49.977%	51.214%	50.858%
Originating Revenue	100. %	100. %	100. %	100. %
(Divide by 3)	225.221%	214.537%	215.442%	215.403%
Wisconsin percentage	75.074%	71.512%	71.814%	71.801%

As a result of the Department's use of the above described three factor formula taxpayer's total assess-

107 ment was reduced from $34,617 to $34,490 or a reduction of some $127. Taxpayer sought a review of the foregoing additional assessment before the Board and, as indicated, the Board affirmed the Department's additional assessment.

QUESTIONS INVOLVED

There is really only one question or issue involved. However, it may be stated in two different ways as follows: (1) What portion of taxpayer's income is derived from business transacted and property located in Wisconsin? (2) Does the formula utilized by the Department reasonably apportion income properly assignable to Wisconsin?

STATUTES INVOLVED

Section 71.07, Stats., provides, so far as here material (the pertinent language of the statute was not amended from 1951 to 1959):

"(1) • • •

"(2) *Persons engaged in business within and without the state shall be taxed only on such income as is derived from business transacted and property located within the state.* The amount of such income attributable to Wisconsin may be determined by an allocation and separate accounting thereof, when the business of
108 such person within the state is not an integral part of a unitary business, provided, however, that the department of taxation may permit an allocation and separate accounting in any case in which it is satisfied that the use of such method will properly reflect the in-

come taxable by this state. In all cases in which allocation and separate accounting is not permissible, the determination shall be made in the following manner: There shall first be deducted from the total net income of the taxpayer such part thereof (less related expenses, if any) as follows the situs of the property or the residence of the recipient, provided, that in the case of income which follows the residence of the recipient, the amount of interest and dividends deductible under this provision shall be limited to the total interest and dividends received which are in excess of the total interest (or related expenses, if any) paid and allowable as a deduction under section 71.04 during the income year. The remaining net income shall be apportioned to Wisconsin on the basis of the ratio obtained by taking the arithmetical average of the following 3 ratios:

"(a) The ratio of the tangible property, real, personal and mixed, owned and used by the taxpayer in Wisconsin in connection with his trade or business during the income year to the total of such property of the taxpayer owned and used by him in connection with his trade or business everywhere . . .

"(b) In the case of persons engaged in manufac-
109 turing or in any form of collecting, assembling or processing goods and materials, the ratio of the total cost of manufacturing, collecting, assembling or processing within this state to the total cost of manufacturing or assembling or processing everywhere . . .

". . .

"(c) In the case of trading, mercantile or manufacturing concerns the ratio of the total sales made through or by offices, agencies or branches located in Wisconsin during the income year to the total net sales made everywhere during said income year . . .

"(3) Where, in the case of a person engaged in business within and without the state of Wisconsin and required to apportion his income as herein provided, it shall be shown to the satisfaction of the department of taxation, that the use of any one of the 3 ratios above provided for gives an unreasonable or inequitable final average ratio because of the fact that such person does not employ, to any appreciable extent in his trade or business in producing the income taxed, the factors made use of in obtaining such ratio, this ratio may, with the approval of the department of taxation, be omitted in obtaining the final average ratio which is to be applied to the remaining net income.

"(4) * * *

"(5) If the income of any such person properly assignable to the state of Wisconsin cannot be ascertained with reasonable certainty by either of the foregoing methods, then the same shall be apportioned and allocated under such rules and regulations as the department of taxation may prescribe.

"(6) * * *." (Emphasis supplied.)

RULE INVOLVED

"TAX 2.45. APPORTIONMENT IN SPECIAL CASES. When the business of any person within Wisconsin is an integral part of a unitary business conducted within and without Wisconsin, but because of unusual or unique circumstances the portion of the income of such person derived from business transacted in Wisconsin cannot be ascertained with reasonable certainty by use of the apportionment formula provided in section 71.07 (2) of the statutes (or by separate accounting in view of the unitary nature of the business), *the department will substitute in the*

place of some or all of the statutory apportionment factors such other factor or factors as will reasonably apportion to Wisconsin the business income properly assignable to Wisconsin. In any case in which an apportionment of business income is made pursuant to this regulation, the taxpayer, at the time of the assessment, will be apprised of the factors used in the formula adopted. The business income of interstate air carriers shall be apportioned as provided in section Tax 2.46." (Emphasis supplied.)

The Board, among other things, found that there was
111 no evidence in the record that would support a finding that the formula used by the Department taxes net income having a tax situs outside the State of Wisconsin. Obviously, that is not the test. The real test is whether the Board by the use of its formula has taxed only such income *as is derived from business transacted and property located within the State.*

The Board also concluded that the Department's formula adequately determined taxpayer's Wisconsin income and complied with Section 71.07 (5). This falls far short of a conclusion that the Department's formula taxes only such income of the taxpayer as is derived from business transacted and property located within the State.

Taxpayer takes strong exception to several findings or, better perhaps, lack of findings, of the Board. It is not necessary to discuss such alleged errors in view of our conclusion that the Department's formula does not comply with the statute, is probably in violation of the commerce clause of the United States Constitution and is an arbitrary apportionment of income earned in Wisconsin, at least to the extent of the one-third apportionment based

on the originating revenue factor. In its opinion the Board stated that it was basing its decision on *Moore Motor Freight Lines, Inc. v. Department of Taxation*, 14 Wis. 112 (2d) 377, which it felt was conclusive in the matter. This is a rather strange assertion in view of the fact that the *Moore* case in no way considered the correctness of the apportionment formula there used.

In the *Moore* case the taxpayer, an irregular common carrier, had its principal place of business in St. Paul. It maintained no office or terminal facilities in Wisconsin and paid no wages in this State. Obviously driver wages were earned in Wisconsin as over 73 per cent of the taxpayer's revenue miles occurred on Wisconsin highways.

The chief issues in that case were whether or not the taxpayer was doing business in Wisconsin within the meaning of Chapter 71 and therefore subject to taxation on its apportioned Wisconsin income. If so subject, was the tax computed by Wisconsin in violation of either the commerce clause or the Fourteenth Amendment of the Federal Constitution?

In the *Moore* case the Department used a two factor formula. (1) Revenue miles traveled in Wisconsin. (2) Originating revenue.

Inasmuch as originating revenue was all assigned to Minnesota and therefore zero in Wisconsin, the taxpayer's Wisconsin income was figured at 50 per cent of the miles traveled in this State. No one raised any question as
113 to the legality of this formula because it was so obviously loaded in the taxpayer's favor.

In our opininon, in the *Moore* case the Department conceded far too much to the Minnesota corporation, but the mere fact that in one case a foreign corporation is underassessed does not justify the over-assessment of a Wisconsin corporation in a somewhat similar situation. In the *Moore* case the Court, citing from the holding of the United States Supreme Court in the companion cases of *Northwestern States Portland Cement Co. v. Minnesota,* and *Williams v. Stockham Valves and Fittings, Inc.* (1959), 358 U. S. 450, 79 Sup. Ct. 357, and 3 L. Ed. (2d) 421, pointed out that net income from the interstate operations of a foreign corporation may be subjected to State taxation provided the levy is *non-discriminatory and is properly apportioned to local activities within the taxing State* forming sufficient nexus to support the same.

The Court in the *Moore* case held the Wisconsin apportioned income tax constitutional in all respects because it was fairly apportioned and non-discriminatory. This took care of the commerce clause argument. The Court further found that the facilities and benefits, including the protection of Wisconsin laws, all of which were furnished by the taxing State formed a sufficient nexus on which the 114 tax in question could be based. This took care of any due process requirement under the Fourteenth Amendment. To repeat, the actual apportionment formula used was not under attack by either side and was not considered by the Court, even though it was greatly weighted in favor of the foreign corporation's domiciliary State, Minnesota.

In leaving the *Moore* case the following quotation from page 392 of the opinion is in point:

> "In passing, it perhaps should be noted that no issue of multiple taxation is before us on this appeal. Because of the impossibility of successfully attacking the fairness of the apportionment formula here applied by the department, a more-likely forum for raising this issue would be Minnesota, the domiciliary state. The majority opinion in the Portland Cement Co. Case had this comment to make on that problem (p. 462):
> " 'Logically it is impossible, when the tax is fairly apportioned, to have the same income taxed twice. In practical operation, however, apportionment formulas being what they are, the possibility of the contrary is not foreclosed, especially by levies in domicilary states.' "

Under the doctrine of the *Moore* case the taxpayer in the instant case was clearly doing business in Illinois, Iowa, Minnesota and many other states. Taxpayer was, therefore, subject to a properly apportioned income tax in
115 each of the states in which it was transacting business.

Consequently it is all the more important that the apportionment formula adopted by the domiciliary State be completely free of discrimination if it is to avoid any possibility of creating double taxation. In the Court's opinion the formula adopted by the Department in the case at bar clearly opens the door to the danger of multiple taxation of the same income by more than one State.

Another recent Wisconsin apportionment income tax case which we feel is much more in point than the *Moore* case, *supra*, is *Department of Taxation v. Blatz Brewing Co.*, 12 Wis. (2d) 615. In the *Blatz* case there were two principal issues involved. (1) Whether Blatz was engaged in business within and without the State during 1947 and 1948 when it maintained no sales offices outside the State

of Wisconsin. (2) What was the proper method of determining the property ratio for the years in which Blatz was entitled to apply the apportionment formula?

The Supreme Court reversed the lower court and held that Blatz was only engaged in business in the State of Wisconsin during the years 1947 and 1948 and therefore was not entitled to apportion its income in those two years. However, with respect to the proper method of determining the property ratio the Supreme Court agreed with
116 the Circuit Court. With respect to the issue of the property ratio it concerned the matter of the situs of certain containers, kegs, bottles, neon signs and coolers, all of which were portable items and often in transit. It also concerned the situs of certain furniture, fixtures and automobiles of salesmen and divisional managers. In developing a ratio the Department at first assigned all of the above items to Wisconsin. It then reconsidered and assigned the containers on the basis of the sales ratio reported in each of the two years in question. Both the trial Court and the Supreme Court disagreed with the Department and accepted the accounting method used by the taxpayer to determine the physical situs of the returnable containers. In so deciding, the Court stated at page 626 as follows:

> "On the second question, the department contends the formula in sec. 71.07 (2), Stats., intended to allocate the business income among the sum of the states in which business was done. We do not so construe the statute. Once a taxpayer is 'engaged in business' within and without this state, entitling the taxpayer to use the apportionment formula, Wisconsin is restricted to taxing *'only on such income as is derived*

from business transacted and property located within the state.' It is no concern of Wisconsin that some of
117 the net business may be allocated out of the state where, because of different taxing laws or the absence of them, it is not taxed. Nor is there any requirement the taxpayer in using the apportionment formula, must assign income only to those states in which it is doing business, in the general business sense used by the department. *Apportionment does not give the department the right to collect the most tax but only the fairest share and that share to be derived from business transacted and property* in this state. *Standard Oil Co. v. Wisconsin Tax Comm.* (1929), 197 Wis. 630, 223 N. W. 85.

"The accounting method used by Blatz to determine the physical situs of the returnable containers within Wisconsin was, as the trial court said, a 'factual and sound equitable basis upon which to allocate.' Exact precision in the apportioning of income is not required. *Armour & Co. v. Department of Taxation* (1948), 252 Wis. 468, 32 N. W. (2d) 324. The averaging method applied to property which moves in and out of a state has been approved to determine its location for the purpose of taxation. *American Refrigerator Transit Co. v. Hall* (1899), 174 U. S. 70, 19 Sup. Ct. 599, 43 L. Ed. 899; *Johnson Oil Refining Co. v. Oklahoma ex rel. Mitchell* (1933), 290 U. S. 158, 54 Sup. Ct. 152; 78 L. Ed. 238. The action of the board of tax appeals, in holding that in the absence of definite proof, the property factor should be based on sales, was arbitrary and capricious. It follows that the allocation of these containers on sales alone, as was done in the modified additional assessment and approved by
118 the board, or on the basis of 50 per cent to sales and 50 per cent to manufacturing, as now contended by the department, cannot be sustained, because those contentions are based on an erroneous theory and

ignore the weight of the property factor in the formula. Such contentions reduce the three-factor formula to a two-factor formula in this case. *The department is bound to use the statutory method even though another method may appear more convenient or expedient to it. Northern States Power Co. v. Tax Comm.* (1941), 237 Wis. 433, 297 N. W. 578. Likewise, the neon signs, coolers, and other personal property should not be apportioned on sales but on their physical location by the method use and as reported by Blatz in its returns . . ."

Blatz was a manufacturer and purveyor of beer. Consequently all three ratios, i.e., property, manufacturing activities and sales, all applied to the ultimate apportionment formula approved by the Supreme Court.

In the instant case the taxpayer is not engaged in manufacturing, assembling or processing of goods nor is it a trading, mereantile or manufacturing concern engaging in sales. Consequently neither the manufacturing nor sales factors prescribed by the statute can be used. However, taxpayer does have real and personal tangible property located both within and without the State of Wisconsin which directly contributes to revenue earned
119 both within and without the State. Consequently we feel that the Board was bound to use the property factor prescribed by Section 71.07 (2) (a) and the failure to utilize such statutorily prescribed factor was error on the part of the Board.

There appears to be no reasonable explanation why the tangible property factor prescribed in Section 71.07 (2) (a) was not used. Taxpayer had terminal, garage and services facilities in states other than Wisconsin. It also

had rolling stock, some of which was permanently located outside the State while the remainder was located without the State for roughly 50 per cent of the time.

The Department either overlooked or ignored the foregoing and arbitrarily substituted a so-called originating revenue factor for the tangible property factor. The factor utilized by the Board has no direct or causal connection to that revenue produced by taxpayer's drivers and other personnel when they perform substantial revenue producing services outside the State of Wisconsin.

The Attorney General argues that the use of the tangible property factor would weigh too heavily in favor of the taxpayer. We do not agree. Perhaps the revenue mile factor weighs somewhat against Wisconsin as only half of the miles were traveled in Wisconsin yet the principal 120 and main terminal activities were located in this State.

On the other hand, the second factor, the payroll factor, certainly weighs heavily in favor of Wisconsin. We say this because most of the permanent supervisory personnel and all of the executive personnel, with their high salaries, were located in Wisconsin and this obviously weighted the payroll factor in favor of Wisconsin. By the use of its originating revenue factor the Department has completely ignored taxpayer's terminal activities in Iowa and Minnesota and all of its unloading procedures which certainly were instrumental in producing revenue. The Department has also completely ignored all of taxpayer's hauls which originated and terminated completely without the State of Wisconsin.

The Department and the Attorney General try to equate originating revenue with sales. The two are not at

all similar and, in any event, the taxpayer is not a trading, mercantile or manufacturing concern and therefore the sales factor cannot be used in any apportionment ratio. Finally, the Department argues that the use of the property ratio would be too difficult to ascertain. In the light of the ruling in the *Blatz* case this argument is without merit. Obviously taxpayer's tangible real and personal property which has a fixed situs poses no problem in the matter of determining a correct ratio. With respect to taxpayer's rolling stock which crosses State lines, this
121 poses a problem quite similar to the returnable containers at issue in the *Blatz* case, and the situs of such rolling stock may be determined in accordance with the directions prescribed by the high Court in the *Blatz* case.

This may be just a coincidence but it appears in the *Moore* case our Department of Taxation was doing its best to assess gingerly the net income of a foreign corporation earned in the State of Wisconsin. In the case at bar it is our view that the Department has done its best to tax more of the taxpayer's net income than was actually derived from services performed and property located within this State. The record shows that the taxpayer here, an Illinois corporation, was originally domiciled in Chicago. It seems to the writer that the action of the Department is best calculated to drive the taxpayer out of Janesville and back to Chicago in order to keep it from incurring double taxation.

Assuming for purposes of argument that taxpayer did move its corporate office back to Chicago it then could receive all its so-called originating revenue in Chicago and that factor, if still used by the Department, would

then weigh heavily against the State of Wisconsin. We use this illustration to indicate that in our opinion the Department has adopted an arbitrary and capricious factor in its apportionment formula.

122 The case must be remanded to the Board of Tax Appeals for further proceedings consistent with this opinion. The Board of Tax Appeals is directed to recompute the additional assessment based on an apportionment formula made up of the following factors: (1) The tangible property factor prescribed by Section 71.07 (2) (a). (2) The payroll factor previously utilized by the Department. (3) The revenue mileage previously utilized by the Department.

Counsel for the taxpayer may prepare the requisite form of judgment reversing the decision and order of the Wisconsin Board of Tax Appeals and remanding same to the Board for further proceedings consistent with this opinion. Same should be submitted to the Attorney General before submission to the Court for signature.

Dated, November 22, 1961.

RICHARD W. BARDWELL
Circuit Judge

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IN THE

SUPREME COURT of the UNITED STATES

October Term, 1962

No. 1008

W. R. ARTHUR & CO., INC.,

Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION,

Appellee.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF WISCONSIN

MOTION OF APPELLEE TO DISMISS APPEAL AND BRIEF

GEORGE THOMPSON,
Attorney General of Wisconsin

HAROLD H. PERSONS,
Assistant Attorney General

E. WESTON WOOD
Assistant Attorney General

Attorneys for Appellee.

Post Office Address:

114 East
State Capitol
Madison 2, Wisconsin

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MOTION TO DISMISS

Pursuant to Rule 16 of the Revised Rules the appellee, Wisconsin Department of Taxation, moves this court to dismiss with costs the appeal taken herein to this court by W. R. McArthur & Company, Inc., upon the following ground:

1. No substantial Federal question is presented.

STATEMENT OF THE CASE

This is a state income tax apportionment case. The appellant, W. R. Arthur & Co., Inc., is a corporation, incor-

porated in Illinois, but having its office and place of business at Janesville, Wisconsin. It is engaged in a unitary, multi-state business of transporting new Chevrolet automobiles and trucks from the manufacturer's assembly plant at Janesville, Wisconsin to the dealers in the midwest. It seeks a review of the judgment of the Supreme Court of Wisconsin which affirmed an assessment of Wisconsin income taxes against the appellant on the part of the net income of the appellant in the years 1953 through 1956 attributable to business transacted within the State of Wisconsin. The amount of its total net income in each of the years so attributed to business transacted within Wisconsin and subjected to Wisconsin income taxation was calculated, pursuant to sec. 71.07 (2) Wisconsin Statutes, by the application of an apportionment formula composed of three factors: (1) revenue miles, (2) payroll, [non-driver payroll assigned a situs where headquartered and driver payroll assigned a situs on basis of revenue miles], and (3) originating revenue [assigned a situs at place of receipt].

STATUTES INVOLVED

Sec. 73.02, Wisconsin Statutes, creates the appellee, Wisconsin Department of Taxation, as a department of state government of the State of Wisconsin. The duties of said department as set out in sec. 73.03, Wisconsin Statutes, include the general supervision of the administration and enforcement of the state income tax imposed by ch. 71, of the Wisconsin Statutes. It is the governmental agency or subdivision by which the State of Wisconsin administers its income tax laws. The Wisconsin Department of Taxation is fully authorized by the Wisconsin Statutes to make

the additional assessment involved. As no question is raised in respect thereto the statutory authority for it to so act is not set out.

The provisions of the Wisconsin Income Tax Law are in ch. 71 of the Wisconsin Statutes. So far as relevant here they are set forth at pages 4, 5 and 6 of the Appellant's Jurisdictional Statement. It is provided in sec. 71.07(2), that the amount of income of persons [includes corporations by express definition sec. 71.02(1)], engaged in business within and without the State of Wisconsin shall be taxed only on such income as is derived from business transacted within the state; that if the business transacted in the state is not part of a unitary business the amount of income attributable to Wisconsin may be determined by separate accounting; but where the business is unitary then the amount of Wisconsin taxable income is to be determined by a three factor formula composed of (a) tangible property, (b) cost of manufacturing, and (c) sales. It is then provided in sec. 71.07 (3), that if the use of any of the three factors produces an unreasonable or unequitable result such factor or factors may be omitted from the formula. Then sec. 71.07 (5), provides that if, by any of the foregoing, the income properly assignable can not be ascertained, then the income shall be apportioned and allocated upon such basis as the Wisconsin Department of Taxation may, in accordance with its rules and regulations, prescribe. Because the use of the three-factor formula was inappropriate to the taxpayer's business and as dropping out factors therein did not provide a reasonable method for apportionment, the Wisconsin Department of Taxation applied an apportionment formula consisting of revenue miles, payroll and originating revenue as deemed

to be an apportionment formulua which fairly and reasonably apportioned to Wisconsin that portion of the net business income of the appellant as was attributable to business conducted within Wisconsin. This was in accordance with the promulgated formal published rule of the Wisconsin Department of Taxation, designated Tax 2.45, as set forth at page 6 of Appellant's Jurisdictional Statement.

FACTS

While the appellant, W. R. Arthur & Co., Inc., is a corporation incorporated in Illinois, it has its general office and place of business at Janesville, Wisconsin, adjacent to the Chevrolet automobile assembly plant of General Motors Corporation. The sole business of the appellant is the transporting of new Chevrolet automobiles and trucks from said assembly plant, to dealers in Wisconsin, Illinois, Indiana, Iowa, upper Michigan, Minnesota, Missouri, Montana, Nebraska and North and South Dakota. Other than a garage relay station which is owned at Black River Falls, Wisconsin, a minor relay station rented at Manchester, Iowa and an experimental operation conducted out of motel locations in Minnesota, the W. R. Arthur & Co., Inc., had no office or facility other than its office and receiving and dispatching terminal facility at Janesville, Wisconsin.

Taxpayer's business was entirely the hauling of one commodity, new Chevrolet automobiles and trucks from the manufacturer's assembly plant to the dealers in such new vehicles. It had only one customer, the Chevrolet division of General Motors Corporation at its assembly plant at Janesville, Wisconsin. The new automobiles and

trucks were moved by appellant by two methods. 96% were moved by the "haulaway," also known as the "truck-away," method and 4% were hauled or transported by being driven under their own power by employees of the taxpayer, which is known as the "driveaway" method. The "haulaway" method consisted of the transportation of the new vehicles upon specifically designed semi-trailers carrying either four new Chevrolet automobiles or three new Chevrolet trucks, drawn or pulled by power units,—heavy duty trucks known as truck-tractors.

All of the transportation actually originated at the Chevrolet plant at Janesville, Wisconsin. Beyond question, 98% of the hauling of new vehicles was started at the Janesville plant. Such other hauling as was done was nominal in amount and insignificant. It involved the movement of new vehicles between auto shows at the start of a model year, some readjusting of inventory between dealers at the end of a model year, the return of new cars from Chevrolet dealers to the factory at Janesville, and the movement of some new trucks from Streeter, Illinois, after the installation of special dump boxes there, which trucks had been initially transported by the taxpayer from the Janesville plant to Streeter, Illinois for such installation. All of the hauling, regardless of where the haul at the time originated, was for the Chevrolet division of General Motors Corporation and was performed under tariffs negotiated by the taxpayer's officers headquartered at Janesville, Wisconsin.

The taxpayer's revenue was entirely from the Chevrolet plant at Janesville for which all of such transportation service was performed. Taxpayer was a contract carrier and the Chevrolet division of the General Motors Corpora-

tion was its only customer and the only one for which taxpayer was authorized to perform transportation services. All billing by the taxpayer was to said Chevrolet division of the General Motors Corporation. Taxpayer took possession of the new Chevrolet automobiles and trucks at the factory gate at Janesville, stored them at its facilities at Janesville, loaded them onto trailers, transported them by said truck and semi-trailers or drove them to the specified Chevrolet dealers to whom they were consigned by the Chevrolet factory, and thereon unloaded and delivered them. For this service, it was compensated under agreements with the Chevrolet division pursuant to which the W. R. Arthur & Co., Inc., received a certain amount for actual miles transported plus surcharges for other services, plus allowances for extra driver expense on long hauls (driver lodging) and extra driver expense of unloading LTL shipments—shipments where the load goes to more than one dealer. The basis for the compensation from January 1, 1953 to 1955 was nine cents per mile for each vehicle transported, plus a surcharge of three dollars per car, plus a further surcharge of seventy-five cents per car for each 150 miles after the first 150 miles. If all of the vehicles on the load were not consigned to a single destination, the taxpayer received an additional $1.50 for each vehicle on that load. Subsequent to June 20, 1955, and during the remainder of the period involved, the rates were scaled upward slightly, but on this same scheme or pattern.

The general offices were located at Janesville, Wisconsin in a 40x60 feet two story building known as the Cherry Street office owned by it, upon leased land. The officers of the corporation with an executive payroll of $100,000 a year headquartered there. The officers were responsible

for the conduct of the business, including the negotiations with General Motors Corporation relative to the retention of business and the determination of terms; the purchase of trucks and trailers from General Motors Corporation; the negotiation of union contracts; and the negotiation with state and federal regulatory agencies. In addition, this office housed the claims department, the safety and personnel division, the accounting personnel, and a number of other office work. Altogether there were from twenty to twenty-four office workers employed in various capacities, including the settlement of claims and driver training. The general corporate records were maintained there. The principal dispatchers were headquartered at Janesville. In the latter part of 1956 taxpayer constructed a new 40x70 feet office building on what is known as the Kellogg Street lot which it used for dispatching.

In addition to its offices, appellant during the years involved, operated two large garages at Janesville, a large parking lot at Janesville and had a large garage at Black River Falls, Wisconsin.

The two Janesville garages were located on State Street and Academy Street respectively. The State Street garage was a 200 foot by 60-70 foot building on land owned by the taxpayer. It had drive-through bays with electrically operated overhead doors that could accommodate loaded tractors and trailer units. It was used for greasing, painting, welding, tire repair, brake repair and other like and heavy maintenance of taxpayer's equipment, such as removal and repair and replacement of motors, rear ends and transmissions, and making structural alterations on trailers to accommodate new model Chevrolet automobiles and trucks. There was a stock room for replacement parts for equip-

ment. The Academy Street garage was a two story 100 by 70 feet cement block building and was owned by the taxpayer at a cost of $70,000. Except for brake work and painting it performed the same functions as the State Street garage and similarly had a parts room for storage of tires, motors and repair parts.

Forty to forty-five men worked in these two garages and included shop supervisors, foremen, greasers, tire men, welders, brake men, mechanics and janitors.

Taxpayer took possession of the new Chevrolet automobiles and trucks at the factory gates at Janesville and assumed the risk of loss or damage from that point. About twenty persons were employed by taxpayer to drive new cars from the factory gates to its parking area. Prior to 1956 taxpayer parked the new vehicles on land owned by the Chevrolet division adjacent to the taxpayer's office. In 1956 taxpayer began the development of the Kellogg Street parking area near the factory on eighty acres developed in 1956 for parking purposes and built upon it the 40 feet by 70 feet building used for dispatching purposes. It had also started construction on a large garage to replace the Academy Street garage.

At that time it was using loading docks it had constructed at a cost of $15,000. It had installed a cyclone fence and lighting around the parking area and in the loading area. By the end of 1956 the parking area had been developed to accommodate 2,000 new vehicles. Taxpayer's watchmen checked the area with a twenty-four hour a day watch service. The loading took place at parking areas at all hours of the day and night and in all kinds of weather. Dispatchers were on duty on a twenty-four hour a day

basis. In view of the fact that the Chevrolet cars and trucks were manufactured against specific orders from dealers and identified with serial numbers, the dispatchers at Janesville had to have the cars loaded so as to get the correct cars to the correct dealer and in correct sequence relative to unloading.

Early in 1954 taxpayer finished construction of a two story 100x70 feet garage at Black River Falls, Wisconsin, similar in size and construction to the Academy Street garage at Janesville, which it used for the balance of the period involved. About five to seven shop personnel were there, such as shop supervisors, mechanics, grease and tire men, utility men and clerk. This garage served as a relay point for the changing of drivers and tractors. It was also used to service and inspect equipment, make major and minor repairs to equipment, dispatch equipment and drivers, handle complaints from dealers and hold safety meetings. A full supply of parts, tires and gasoline was kept there. On the relay of a load of new cars and trucks the trailer was detached from the power unit (the tractor-truck), and a new power unit was attached and the load then continued with a fresh driver.

Sometime in 1953 appellant experimented with the establishment of a relay point in the Cedar Rapids, Iowa area and sometime in 1954 established a minor relay operation at Manchester, Iowa in a rented garage building large enough to service three tractors or power units, which had a wash space, parts and supply storage area and a drivers' room. The personnel there consisted of a supervisor, a tire and grease man, three mechanics, a handy man and a clerk. There was a parking space of about four acres for the

tractors and trailers. The fact that the non-driver payroll outside of Wisconsin in 1953 was only $2000 and in 1954 only $6000 indicates that the operation was nominal in those years. With the possible exception of some power units appellant owned no tangible property in Iowa in 1953, 1954 or 1955. In 1955 it had about 30 power units stationed in Manchester, Iowa and in 1956 37 or 38.

In 1953, 1954 and 1955, and during most of 1956, taxpayer had no relay facility in Minnesota. In the latter part of 1956 it began experimenting with the establishment of a relay facility in that state and had an individual on a temporary basis who was headquartered at Black River Falls, working out of a motel there, but seeking a relay point convenient for hauling from Black River Falls to the Dakotas and Montana. There were 5 to 15 power units involved. It was not until April, 1957 that a relay facility was established at Anoka, Minnesota.

At the Iowa and Minnesota relay points, and at the Black River Falls garage, the tractor-trailer units would be inspected and serviced, the cargo checked, and a new tractor hooked on and the unit dispatched with another driver. Personnel at these relay points sometimes investigated complaints and traced loads.

Of its power units about 200 were stationed at Janesville, about 60 at Black River Falls, about 30 at the Iowa terminal and in the latter part of 1956 from 5 to 15 at the experimental relay point in Minnesota. Except for some minor maintenance in 1955 and 1956 at Manchester, Iowa, all the tractors and semi-trailers were serviced and repaired in the taxpayer's two garages in Janesville, Wisconsin and in its Black River Falls, Wisconsin garage.

Except for its rolling stock which operated within and without Wisconsin, and only a small amount of tools, parts, tires and gasoline in Iowa in the latter part of the period involved, the taxpayer owned no tangible property outside of Wisconsin.

Taxpayer filed Wisconsin income tax returns for each of the four years involved as a unitary business and therein apportioned its net business income to within and without Wisconsin using the single line-haul factor of revenue miles. Following an audit and a hearing, the Wisconsin Board of Tax Appeals affirmed an additional assessment which apportioned a part of the taxpayer's net income in each of the years to Wisconsin by using a three-factor formula of: (1) revenue miles [line-haul], (2) originating revenue [terminal], and (3) payroll—with non-driver payroll assigned to work headquarters and driver payroll spread on revenue miles basis [neutral or mixed line-haul and terminal].

The percentages produced by the use of such factors and the average thereof in the formula were as follows for each of the years:

	1953	1954	1955	1956
Payroll	69.445%	64.560%	64.225%	64.545%
Revenue Miles	55.776%	49.977%	51.214%	50.858%
Originating Revenue	100. %	100. %	100. %	100. %
Divided by 3	225.221%	214.537%	215.442%	215.403%
Average (Wis. %)	75.074%	71.512%	71.814%	71.801%

The payroll factor was determined by allocating to Wisconsin all non-driver personnel whose headquarters were in Wisconsin, and by dividing driver personnel payroll between Wisconsin and other states on the basis of revenue miles within and without the state. The revenue miles factor was simply the percentage which the taxpayer's revenue miles in Wisconsin bore to total revenue miles. The originating revenue factor was 100% Wisconsin because all of taxpayer's revenue was received at the Janesville main office as a result of contracts entered into by said main office personnel.

It is this assessment of additional Wisconsin income taxes for these years which was affirmed by the Supreme Court of the State of Wisconsin by the judgment herein sought to be reviewed.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

1. *Each factor in an apportionment formula is reasonable if the formula is reasonable.*

The sole basis asserted by the appellant in support of this appeal is that the use of originating revenue as one of the three factors in the formula used in making the apportionment of the appellant's net business income makes the tax one on gross receipts and therefore renders the use of such apportionment formula invalid. It makes this assertion notwithstanding that originating revenue is only one of three factors in the formula and that appellant acknowledges that its income attributable to Wisconsin must be determined by an apportionment formula.

It is evident that it takes this position due to the fact that originating revenue is 100% Wisconsin because the entire revenue of the appellant in each of the years was received at its main office and plant at Janesville. In substance, this is the same position that the appellant took before the Supreme Court of the State of Wisconsin, which was that each factor in an apportionment formula standing by itself and used alone, must be a reasonable basis for apportionment of the net income. This obviously is a fallacious position.

In this case the originating revenue is the gross receipts and is used the same as sales in the three-factor statutory formula that would be applied if appellant were a manufacturing concern. The Supreme Court of Wisconsin addressed itself to the appellant's contention and said that the use of the originating revenue or gross receipts factor did not make the formula arbitrary or render the apportionment unfair. It said that inclusion of originating revenue as one of the factors in the three-factor formula constituted a reasonable means of reflecting the taxpayer's income attributable to business done in Wisconsin. It said the formula took into consideration the peculiar nature of the taxpayer's business activity and that it had only one customer and it was in Wisconsin and that the taxpayer was headquartered in Wisconsin.

The Supreme Court of Wisconsin recognized, as does appellee, that, used as a single factor for apportioning multistate income, gross receipts would result in all of the taxpayer's income being taxed in Wisconsin and that this obviously would make the tax unfair and illegal. It said, however, that when it is used in conjunction with two other

factors, it does not make the formula arbitrary or result in an unfair apportionment of the income.

If the position of the appellant were sound, then all that would be needed in an apportionment formula is only one factor. But, the use of a formula composed of more than one factor is due to the very fact that the end result produced by the formula cannot be achieved by using only one factor. This is inherent in the use of a formula to spread income territorily between states. There are a number of factors which, if applied alone, would produce absurd and erroneous results. Yet, when used with other factors, they would result in achieving a proper apportionment. If the result of the formula is reasonable, then the factors in it are all reasonable.

As the Supreme Court of Wisconsin said in its opinion:

". . . If one of several factors is challenged, it must be evaluated by the court not only upon its own merits but also in relation to the other factors, as well as in relation to the total composite result. Thus, the court must look not only at the individual factors but also at the final formula. We believe that in context with each of the other factors included in the formula adopted by the board of tax appeals in the instant case, the factors are all reasonable.

"When a multi-factor formula is used, each factor must bear a reasonable relationship to the taxpayer's business and to the other factors of the formula; it must also produce a fair apportionment when set in combination with other germane factors. The test is not whether, standing alone, a given factor produces a fair apportionment."

2. *Apportionment formula used was fair and reasonable.*

It is related to the unique or peculiar type of business of the appellant. The appellant is engaged in the business of transportation of freight. Traditionally and actually the transportation business is recognized, even by itself, as having two major aspects or facets of its operation which contribute to the success of the entire business, to wit: the terminal activities and the line-haul activities. A fair and reasonable apportionment formula must thus be composed of elements which give effect to the contribution of these two distinct segments of the operation. If these features of the trucking business are to be recognized and used to apportion net income of a multi-state truck operation the apportionment formula must include factors that take cognizance of them.

The line-haul part is the actual movement over the highways of the vehicles in carrying the freight. The terminal portion is very important and necessary part of the business and includes the contribution of the general office in obtaining, managing and keeping the business. There is nothing to suggest that the line-haul predominates over terminal in contributing to the net income from the entire operation. Therefore, it is reasonable that they are assumed to be equal in such contribution and being equal it is only reasonable to give them equal weight in the end-result formula used. The three-factor formula used here of revenue miles, payroll and originating revenue attributes to each of the major elements—line-haul and terminal—and to the labor and capital employed in each, an equal contribution to the net income from the entire operation of the business.

The revenue miles factor is entirely line-haul in nature. Ordinarily ton-miles would be used but here revenue miles were used as the taxpayer used revenue miles in filing its returns and no records for computation of ton-miles were available. Revenue miles reflects the contribution of both the labor and capital involved in the actual hauling and assigns them to where the hauling is done.

The originating revenue factor is terminal, and is comparable to and takes the place of, the sales factor that would be used in the statutory formula which would be applicable if the taxpayer were a manufacturer. Originating revenue reflects the contribution of labor and capital involved in the functioning of the general office and operating terminal (including the garages, etc.) at Janesville, Wisconsin and the fact that all of the services were supervised and directed at such home office and originating terminal.

The payroll factor is neutral, or rather both line-haul and terminal in character, and serves to balance or coordinate the other two factors. In computing the payroll factor the non-drivers were allocated on the basis of the location of their headquarters and the drivers were allocated on the basis of revenue miles. Thus, the payroll reflects labor and capital contributions to the line-haul movement and also the labor and capital contributions to the terminal activity, including the minor relay operations outside of Wisconsin, at the place where those contributions are made. It also reflects the contribution of labor and capital involved in the functioning of the general office and the originating terminal including the garages, etc., at Janesville, Wisconsin and the fact that all of the hauling service was sold, contracted for and generally implemented, directed and supervised by such home office.

Thus, the apportionment formula used in the case was eminently fair and reasonable as calculated to attribute to Wisconsin only that portion of the total net income of the taxpayer as was derived from that part of the business which was transacted and carried on in Wisconsin. Being fairly apportioned by such a formula, the assessment was proper and the taxes involved are valid.

3. *Apportionment of unitary income by a reasonable formula is constitutional.*

It is well established that the net income of a corporation generated by interstate as well as intrastate activities, may be fairly apportioned for tax purposes by a formula utilizing in-state aspects of interstate affairs. *Butler Bros. v. McColgan* (1942), 315 U. S. 501, 62 Sup. Ct. 701, 86 L. Ed. 991; *ET&WNC Transp. Co. v. Currie* (1959), 359 U. S. 28, 79 Sup. Ct. 602, 3 L. Ed. (2d) 625, affirming 248 N. C. 560, 104 S. E. (2d) 403; *N. W. States Portland Cement Co. v. Minnesota* (1959), 358 U. S. 450, 79 Sup. Ct. 357, 3 L. Ed. (2d) 421.

Appellant relies upon *Central Greyhound Lines v. Mealey* (1948), 334 U. S. 653, 68 Sup. Ct. 1260, 92 L. Ed. 1633. That case is in no way pertinent for two reasons. In the first place, it was a gross receipts tax and this court has clearly distinguished between a gross receipts tax and a net income tax. Secondly, the tax there was an unapportioned tax which by its very nature makes interstate activity bear more than its fair share. *N. W. States Portland Cement Co. v. Minnesota* (1950), 358 U. S. 450, 79 Sup. Ct. 357, 3 L. Ed. (2d) 421. However, in the instant case, the tax is laid on an amount that is very carefully apportioned so as to limit

the tax to the amount of net income that is reasonably attributable to business done in Wisconsin.

Hans Rees Sons v. N. C. (1931), 283 U. S. 123, 51 Sup. Ct. 385, 75 L. Ed. 879, is not similar to the instant case. It involved a single factor apportionment formula—a property factor. The tax was unreasonable on its face if, as this court has held, net income derives from both capital and labor. *Stratton's Independent LTD v. Howbert* (1913), 231 U. S. 399, 34 Sup. Ct. 136, 58 L. Ed. 285; *Eisner v. MacComber* (1919), 252 U. S. 189, 40 Sup. Ct. 189, 64 L. Ed. 521. There the State of North Carolina overtaxed because it had most of the property and under its formula nearly all of the income, although there was substantial labor that was employed elsewhere.

The case of *N. W. States Portland Cement Co. v. Minnesota* (1959), 358 U. S. 450, 79 Sup. Ct. 357, 3 L. Ed. (2d) 421, furnishes no support to the appellant. It and the companion case, *Williams v. Stockham Valves & Fittings, Inc.* did not involve how much either Minnesota or Georgia could tax, but only whether they could tax at all.

Here, concededly, the State of Wisconsin has power to tax some part of the appellant's net income from its entire business and the controversy is exclusively over how much of that income is to be apportioned to Wisconsin. The apportionment formula used here is reasonable and fair.

As the assessments here involved impose the Wisconsin income tax upon only that portion of the net business income of appellant which is reasonably attributable to the

business done in Wisconsin, no constitutional question is presented as to the validity thereof under the 14th Amendment. Therefore the judgment of the Supreme Court of Wisconsin was correct and the motion to dismiss the appeal should be granted.

Respectfully submitted,

GEORGE THOMPSON,
Attorney General of Wisconsin

HAROLD H. PERSONS,
Assistant Attorney General

E. WESTON WOOD
Assistant Attorney General

Attorneys for Appellee.

P. O. Address:
114 East, State Capitol,
Madison 2, Wisconsin

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IN THE

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October Term, 1962

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Appellant,

vs.

WISCONSIN DEPARTMENT OF TAXATION,

Appellee.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF WISCONSIN

APPELLANT'S REPLY TO MOTION OF APPELLEE FOR DISMISSAL OF THE APPEAL

ADOLPH J. BIEBERSTEIN
Counsel for Appellant
121 West Doty Street
Madison 3, Wisconsin

Of Counsel:

JOHN C. WICKHEM
1 South Main Street
Janesville, Wisconsin

GEORGE L. WEISBARD
11 South La Salle Street
Chicago, Illinois

THE GILMAN PRESS, MADISON, WIS.

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THE QUESTION IS SUBSTANTIAL

Appellant W. R. Arthur & Co., Inc. respectfully replies, pursuant to Rule 16 of the Revised Rules, to the Motion of the Appellee, Wisconsin Department of Taxation, to dismiss the appeal.

This appeal fundamentally involves determination whether appellant taxpayer has been denied its right to due process under Article XIV of The Amendments to the Constitution of The United States, by virtue of the method appellee adopted to apportion appellant's income between

Wisconsin and the other states in which it conducted its unitary business.

Appellant taxpayer derives its income from the performance of services in interstate commerce as well as intrastate commerce. Appellee's brief states that "all" of the transportation services originated at Janesville, Wisconsin. There were, however, as stated in Appellant's Jurisdictional Statement, services in Illinois intrastate commerce, services in interstate commerce between points in states other than Wisconsin and services in interstate commerce from points outside Wisconsin to Wisconsin. The record shows these were responsible for approximately two percent of appellant's gross revenues.

The principal transportation services of appellant originated in Janesville, Wisconsin, and were performed to points in ten states, including Wisconsin. Four of the ten destination states were authorized to be served on May 21, 1956.

The evidence established that ninety percent of the cargo deliveries were made to points in states other than Wisconsin. As shown in our Jurisdictional Statement, the services producing appellant's gross revenues were of four varieties:

(1) A rate for each mile of transportation for each automobile or truck. The evidence establishes that the revenue mileage in Wisconsin varied during the four tax years in question from a low of 49.997% in 1954 to a high of 55.776% in 1953.

(2) A surcharge for the loading and unloading services of each automobile which was $3.00 to June 20, 1955, $3.50

thereafter until October 1, 1956 and $4.25 thereafter. Truck-loading and unloading services were one-third higher. Ninety percent of the unloadings occurred in states outside Wisconsin.

(3) A surcharge for each 150 mile block of transportation after the first 150 miles. This was 75 cents per automobile with trucks one-third higher. The geographical location of Janesville resulted in this surcharge being applied principally to movements outside Wisconsin.

(4) A surcharge of $1.50 per automobile where the entire load was not delivered to a single consignee. Since 90% of the unloadings occurred outside Wisconsin, this source of revenue is substantially non-Wisconsin.

The record, therefore, clearly establishes that gross revenues were derived to a substantial extent, from services performed by appellant taxpayer in states other than Wisconsin. The appellee, disregarding such facts, has made an assignment of 100% of such revenues to Wisconsin for utilization as a factor in a three factor formula. The remaining factors employed, consisting of proportion of payroll in Wisconsin, and proportion of revenue miles in Wisconsin, are factual and not challenged by appellant taxpayer.

We do not contend that a factor which assigns 100% to Wisconsin may in no case be used in a multi-factor tax formula. Our contention is that it may be used only where it is factually supported by the record.

If, in the instant case the appellee had utilized a 100% factor assigned to Wisconsin for appellant taxpayer's payroll, it would have been clearly arbitrary, because the facts

show that appellant's payroll was paid to compensate services performed in many states other than Wisconsin as well as to compensate the executive and other employees performing services in Wisconsin.

If, in the instant case the appellee had utilized a tangible property factor, and in disregard of the facts had assigned 100% thereof to Wisconsin, it would be clearly arbitrary because the evidence shows tangible property was located in a number of states besides Wisconsin.

If, in the instant case the appellee had utilized a mileage factor, and in disregard of the facts had assigned 100% thereof to Wisconsin, it would likewise be clearly arbitrary because it disregarded the facts.

Instead, what appellee has done here is this; in disregard of the facts clearly showing that a substantial part of appellant's revenues were derived from services performed outside Wisconsin, 100% of such revenues are nevertheless assigned to Wisconsin as a factor, merely because payment is received in Wisconsin. Such assignment is equally arbitrary.

The record established that the sales activities of the appellant which give rise to its single contract with General Motors Corporation took place in Michigan.

Thus, whether the factor of gross revenues, or originating revenues as appellee calls it, is analyzed from the standpoint of where the services are performed from which revenues arise, or from the standpoint of the place where the contract giving rise to the revenue is negotiated, the record will not permit a factual finding that gross revenues should be assigned 100% to Wisconsin.

The appellee devotes considerable space to the description of the tangible property of the appellant in Wisconsin and attempts to minimize its property in other states. The facts are in this record. The record shows that in 1953 73.217% of the appellant's tangible property was located in Wisconsin, in 1954 68.131%, in 1955 66.209% and in 1956 67.373%. Had the appellee employed the same as a factor, it would have been factually correct and not subject to attack. Instead appellee adopted the 100% gross revenue factor which has no factual basis.

The appellee has measured the contribution of the general office of the appellant taxpayer, in obtaining, managing, directing, supervising, and keeping business, by the adoption of the payroll factor. That factor assigns all home office activities to Wisconsin and is factually sound.

A REASONABLE FORMULA MUST BE COMPOSED OF REASONABLE FACTORS

The appellee concedes that were the gross revenue factor of assignment of 100% of the taxpayer's revenues to Wisconsin used as a single factor, it would be clearly illegal. It argues, however, that such illegality is cured when combined with two factually sound factors. It argues that if the result of the formula is reasonable, the factors comprising it are all reasonable.

It is appellant's position that each factor employed must be factually sound. In no other possible way can the result achieved by combining factors be reasonable.

This Court reversed in *Hans Rees' Sons v. North Carolina*, 283 U. S. 123, 75 L. ed. 879, 51 S. Ct. 385, because the

taxing authority had ignored the factual situation and utilized an arbitrary formula.

As pointed out in our Jurisdictional Statement this Court has consistently held that an income tax upon a taxpayer conducting its business activities in more than one state can be sustained, only if it is not discriminatory and is properly apportioned to the activities within the taxing state.

A formula containing a factor or factors which are not factually sound, fails to measure the taxpayer's activities within the taxing state. The greater number of non-factual factors utilized, the greater the degree of discrimination.

In the instant case we have one such factor. Its impact is necessarily one-third and to that extent it arithmetically sullies and proportionately distorts the result. It thus subjects a portion of the taxpayer's income to multiple taxation.

Interstate commerce may not be subjected to the burden of multiple taxation.

> *Portland Cement Co. v. Minnesota*, 358 U. S. 450, 79 S. Ct. 357, 3 L. ed. 2d 421, 67 ALR 2d 1292.

> "An apportionment formula is not valid if it assigns to a state as a tax measure income that could not reasonably be said to result from activities or properties within its boundaries."

> *So. Pac. Co. v. McColgan*, 68 Cal. App. 2d 48; 156 Pac. 2d 81.

This issue has grave consequences to the appellant taxpayer and indeed to every industry engaged in a unitary business in more than one state.

It is therefore respectfully contended that the Supreme Court of the United States should take jurisdiction over this appeal.

Respectfully submitted,

ADOLPH J. BIEBERSTEIN
Counsel for Appellant
121 West Doty Street
Madison 3, Wisconsin

Of Counsel:

JOHN C. WICKHEM
1 South Main Street
Janesville, Wisconsin

GEORGE L. WEISBARD
11 South La Salle Street
Chicago, Illinois